

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Aug 20, 2021

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CRYSTAL F.,

Plaintiff,

v.

KILOLO KIJAKAZI,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

NO: 2:20-CV-00135-FVS

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are the parties' cross motions for summary judgment. ECF Nos. 13 and 14. This matter was submitted for consideration without oral argument. The Plaintiff is represented by Attorney Dana C. Madsen. The Defendant is represented by Special Assistant United States Attorney David J.

¹ Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

ORDER ~ 1

1 Burdett. The Court has reviewed the administrative record, the parties' completed
2 briefing, and is fully informed. For the reasons discussed below, the Court
3 **GRANTS** Defendant's Motion for Summary Judgment, ECF No. 14, and **DENIES**
4 Plaintiff's Motion for Summary Judgment, ECF No. 13.

5 JURISDICTION

6 Plaintiff Crystal F.² filed for supplemental security income and disability
7 insurance benefits on May 13, 2013, alleging an onset date of December 23, 2014.
8 Tr. 210-17. Benefits were denied initially, Tr. 159-62, and upon reconsideration,
9 Tr. 165-69. A hearing before an administrative law judge ("ALJ") was conducted
10 on January 21, 2016. Tr. 42-63. Plaintiff was represented by counsel and testified
11 at the hearing. *Id.* The ALJ denied benefits, Tr. 37-63, and the Appeals Council
12 denied review. Tr. 1. On September 28, 2018, the United States District Court for
13 the Eastern District of Washington granted Plaintiff's Motion for Summary
14 Judgment, and remanded the case for further proceedings. Tr. 728-42. On
15 November 15, 2018, the Appeals Council vacated the ALJ's finding, and remanded
16 for further administrative proceedings. Tr. 743-47. On April 24, 2019, Plaintiff
17 appeared for an additional hearing before the ALJ. Tr. 588-619. The ALJ denied

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21 ² In the interest of protecting Plaintiff's privacy, the Court will use Plaintiff's first
name and last initial.

benefits, Tr. 549-87, and the Appeals Council denied review. Tr. 542-48. The matter is now before this Court pursuant to 42 U.S.C. §§ 405(g); 1383(c)(3).

BACKGROUND

The facts of the case are set forth in the administrative hearing and transcripts, the ALJ's decision, and the briefs of Plaintiff and the Commissioner. Only the most pertinent facts are summarized here.

Plaintiff was 33 years old at the time of the second hearing. *See* Tr. 212. She graduated from high school, and was in special education classes. Tr. 81. She lives with her parents. Tr. 86. Plaintiff has work history as a grocery bagger and garment sorter. Tr. 83-85, 94-95, 612. She testified she cannot work because she's "slow" and "can't concentrate on anything." Tr. 87. Plaintiff testified that she struggles to interact with people because of her anxiety, and reports that she has the "mental capacity of a 13-year-old." Tr. 81-82. At the second hearing, Plaintiff testified that her irritable bowel syndrome "causes [her] to not function half the day," because she has to go to the bathroom three to four times every morning. Tr. 604-05. She reported difficulties with short-term memory and concentration, as well as difficulty sleeping even with medication. Tr. 606-07. Plaintiff testified that she only leaves the house one or twice a week. Tr. 609.

STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is

1 limited; the Commissioner’s decision will be disturbed “only if it is not supported
2 by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153,
3 1158 (9th Cir. 2012). “Substantial evidence” means “relevant evidence that a
4 reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1159
5 (quotation and citation omitted). Stated differently, substantial evidence equates to
6 “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and
7 citation omitted). In determining whether the standard has been satisfied, a
8 reviewing court must consider the entire record as a whole rather than searching
9 for supporting evidence in isolation. *Id.*

10 In reviewing a denial of benefits, a district court may not substitute its
11 judgment for that of the Commissioner. “The court will uphold the ALJ’s
12 conclusion when the evidence is susceptible to more than one rational
13 interpretation.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir.
14 2008). Further, a district court will not reverse an ALJ’s decision on account of an
15 error that is harmless. *Id.* An error is harmless where it is “inconsequential to the
16 [ALJ’s] ultimate nondisability determination.” *Id.* (quotation and citation omitted).
17 The party appealing the ALJ’s decision generally bears the burden of establishing
18 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

19 FIVE-STEP EVALUATION PROCESS

20 A claimant must satisfy two conditions to be considered “disabled” within
21 the meaning of the Social Security Act. First, the claimant must be “unable to

1 engage in any substantial gainful activity by reason of any medically determinable
2 physical or mental impairment which can be expected to result in death or which
3 has lasted or can be expected to last for a continuous period of not less than twelve
4 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s
5 impairment must be “of such severity that he is not only unable to do his previous
6 work[,] but cannot, considering his age, education, and work experience, engage in
7 any other kind of substantial gainful work which exists in the national economy.”
8 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

9 The Commissioner has established a five-step sequential analysis to
10 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
11 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner
12 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),
13 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
14 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
15 404.1520(b), 416.920(b).

16 If the claimant is not engaged in substantial gainful activity, the analysis
17 proceeds to step two. At this step, the Commissioner considers the severity of the
18 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
19 claimant suffers from “any impairment or combination of impairments which
20 significantly limits [his or her] physical or mental ability to do basic work
21 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),

1 416.920(c). If the claimant's impairment does not satisfy this severity threshold,
2 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.
3 §§ 404.1520(c), 416.920(c).

4 At step three, the Commissioner compares the claimant's impairment to
5 severe impairments recognized by the Commissioner to be so severe as to preclude
6 a person from engaging in substantial gainful activity. 20 C.F.R. §§
7 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more
8 severe than one of the enumerated impairments, the Commissioner must find the
9 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

10 If the severity of the claimant's impairment does not meet or exceed the
11 severity of the enumerated impairments, the Commissioner must pause to assess
12 the claimant's "residual functional capacity." Residual functional capacity (RFC),
13 defined generally as the claimant's ability to perform physical and mental work
14 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
15 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the
16 analysis.

17 At step four, the Commissioner considers whether, in view of the claimant's
18 RFC, the claimant is capable of performing work that he or she has performed in
19 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
20 If the claimant is capable of performing past relevant work, the Commissioner
21 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f).

1 If the claimant is incapable of performing such work, the analysis proceeds to step
2 five.

3 At step five, the Commissioner considers whether, in view of the claimant's
4 RFC, the claimant is capable of performing other work in the national economy.
5 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination,
6 the Commissioner must also consider vocational factors such as the claimant's age,
7 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
8 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the
9 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
10 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other
11 work, analysis concludes with a finding that the claimant is disabled and is
12 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1).

13 The claimant bears the burden of proof at steps one through four. *Tackett v.*
14 *Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five,
15 the burden shifts to the Commissioner to establish that (1) the claimant is capable
16 of performing other work; and (2) such work "exists in significant numbers in the
17 national economy." 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v. Astrue*,
18 700 F.3d 386, 389 (9th Cir. 2012).

19 ALJ'S FINDINGS

20 At step one, the ALJ found that Plaintiff has not engaged in substantial
21 gainful activity since December 23, 2012, the alleged onset date. Tr. 555. At step

1 two, the ALJ found that Plaintiff has the following severe impairments: borderline
2 intellectual functioning vs learning disorders; alcohol dependence/abuse, in self-
3 reported remission; ADHD; persistent depressive disorder; unspecified anxiety
4 disorder. Tr. 555. At step three, the ALJ found that Plaintiff does not have an
5 impairment or combination of impairments that meets or medically equals the
6 severity of a listed impairment. Tr. 564. The ALJ then found that Plaintiff has the
7 RFC

8 to perform a full range of work at all exertional levels but with the following
9 nonexertional limitations: the claimant is able to understand, remember, and
10 carryout simple, routine, and repetitive tasks/instructions; is able to maintain
11 concentration, persistence and pace on simple, routine tasks for two-hour
12 intervals between regularly scheduled breaks; predictable work environment
13 with seldom changes; no fast paced production rate of pace; no judgment or
14 decision making; no reading/writing as an essential function of the job; brief
15 and superficial (defined as non-collaborative/no tandem tasks) interaction
16 with coworkers, supervisors and the public; no crowds (defined as groups 3-
17 4 people or more).

18 Tr. 566. At step four, the ALJ found that Plaintiff is unable to perform any past
19 relevant work. Tr. 575. At step five, the ALJ found that considering Plaintiff's
20 age, education, work experience, and RFC, there are jobs that exist in significant
21 numbers in the national economy that Plaintiff can perform, including:

housekeeping cleaner and marker, price. Tr. 576. On that basis, the ALJ
concluded that Plaintiff has not been under a disability, as defined in the Social
Security Act, from December 23, 2012, through the date of the decision. Tr. 576.

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ISSUES

Plaintiff seeks judicial review of the Commissioner's final decision denying her disability insurance benefits under Title II of the Social Security Act and supplemental security income benefits under Title XVI of the Social Security Act. ECF No. 13. Plaintiff raises the following issues for this Court's review:

1. Whether the ALJ properly considered Plaintiff's symptom claims; and
2. Whether the ALJ properly considered the medical opinion evidence.

DISCUSSION

A. Plaintiff's Symptom Claims

An ALJ engages in a two-step analysis when evaluating a claimant's testimony regarding subjective pain or symptoms. "First, the ALJ must determine whether there is objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged." *Molina*, 674 F.3d at 1112 (internal quotation marks omitted). "The claimant is not required to show that his impairment could reasonably be expected to cause the severity of the symptom he has alleged; he need only show that it could reasonably have caused some degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal quotation marks omitted).

Second, "[i]f the claimant meets the first test and there is no evidence of malingering, the ALJ can only reject the claimant's testimony about the severity of the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the

1 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal
2 citations and quotations omitted). “General findings are insufficient; rather, the
3 ALJ must identify what testimony is not credible and what evidence undermines
4 the claimant’s complaints.” *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th
5 Cir. 1995)); *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (“[T]he ALJ
6 must make a credibility determination with findings sufficiently specific to permit
7 the court to conclude that the ALJ did not arbitrarily discredit claimant’s
8 testimony.”). “The clear and convincing [evidence] standard is the most
9 demanding required in Social Security cases.” *Garrison v. Colvin*, 759 F.3d 995,
10 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920,
11 924 (9th Cir. 2002)).

12 Here, the ALJ found Plaintiff’s medically determinable impairments could
13 reasonably be expected to cause some of the alleged symptoms; however,
14 Plaintiff’s “statements concerning the intensity, persistence, and limiting effects of
15 these symptoms are not entirely consistent with the medical evidence and other
16 evidence in the record” for several reasons. Tr. 567.

17 *1. Daily Activities*

18 The ALJ found that Plaintiff’s “daily activities, while somewhat limited, are
19 consistent with the RFC outlined [by the ALJ].” Tr. 570. A claimant need not be
20 utterly incapacitated in order to be eligible for benefits. *Fair*, 885 F.2d at 603; *see*
21 *also Orn*, 495 F.3d at 639 (“the mere fact that a plaintiff has carried on certain

1 activities . . . does not in any way detract from her credibility as to her overall
2 disability.”). Regardless, even where daily activities “suggest some difficulty
3 functioning, they may be grounds for discrediting the [Plaintiff’s] testimony to the
4 extent that they contradict claims of a totally debilitating impairment.” *Molina*,
5 674 F.3d at 1113.

6 In support of this finding, the ALJ cited Plaintiff’s ongoing reports of
7 “relatively good functional activities,” including maintaining a savings and
8 checking account; doing household chores such as vacuuming, mopping, cleaning
9 bathrooms, and doing dishes; attending to personal care; watching TV; surfing the
10 internet; playing video games; sewing; walking her dog; reading; preparing simple
11 lists and following a small shopping list; and archery. Tr. 570 (citing Tr. 329, 335,
12 375, 384, 449, 994, 1063, 1076, 1107 (“activities of daily living are within normal
13 limits”). The ALJ also specifically found inconsistencies between Plaintiff’s
14 testimony and her reported activities. For example, Plaintiff testified that she is
15 afraid to leave her house and only goes out 1-2 times a week, but records indicate
16 that Plaintiff walked her dog on a regular basis, went to the grocery store with her
17 mom, and “reported she had recently lost 10 pounds playing pok-e-mon go.” Tr.
18 570 (citing Tr. 994, 1076). The ALJ concluded that these activities show “at least
19 some ability to function in social/public settings,” and “pok-e-mon go requires the
20 player to walk around town/explore in order to catch critters, and [Plaintiff’s]
21 ability to play this game is inconsistent with an individual who is afraid to leave

1 her house due to anxiety and other issues.” In addition, the ALJ found Plaintiff’s
2 “hobbies including reading, comics, and playing video games, which [the ALJ]
3 notes is consistent with an ability to perform at least simple, routine tasks.” Tr.
4 570.

5 Plaintiff generally argues that the ALJ’s reliance on these types of activities
6 was not a clear and convincing reason to discount her symptom claims. ECF No.
7 13 at 14-15; *Fair*, 885 F.2d at 603 (claimant need not be “utterly incapacitated to
8 be eligible for benefits”). In her reply brief, Plaintiff further contends that (1)
9 “[e]ven though [Plaintiff] reported doing these activities, the record does not
10 indicate how proficient she is in performing these activities”; (2) several of
11 Plaintiff’s reports of activities “predated her application” for benefits; and (3) the
12 ALJ is improperly “speculating as to the type of activity [Plaintiff] engaged in
13 when playing Pokemon Go.” ECF No. 15 at 3-5. However, it was reasonable for
14 the ALJ to conclude that Plaintiff’s documented activities, including playing
15 walking and caring for her dog, reading, playing video games 4-5 hours a day,
16 researching on the computer, and caring for the household, was inconsistent with
17 her allegations of entirely debilitating functional limitations, and consistent with
18 the assessed RFC limitation to simple, routine tasks. *Molina*, 674 F.3d at 1113
19 (Plaintiff’s activities may be grounds for discrediting Plaintiff’s testimony to the
20 extent that they contradict claims of a totally debilitating impairment); *Tommasetti*,
21 533 F.3d at 1040 (ALJ may draw inferences logically flowing from evidence).

1 Moreover, even assuming, *arguendo*, that the ALJ erred in making this finding,
2 any error is harmless because, as discussed herein, the ALJ's ultimate rejection of
3 Plaintiff's symptom claims was supported by substantial evidence. *See Carmickle*
4 *v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162-63 (9th Cir. 2008).

5 2. Improvement

6 Next, the ALJ found that treatment records show Plaintiff's anxiety,
7 depression, and ADHD were "generally well-controlled with medication." Tr.
8 567-68. A favorable response to treatment can undermine a claimant's complaints
9 of debilitating pain or other severe limitations. *See Tommasetti v. Astrue*, 533 F.3d
10 1035, 1040 (9th Cir. 2008); *see Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d
11 1001, 1006 (9th Cir. 2006) (Conditions effectively controlled with medication are
12 not disabling for purposes of determining eligibility for benefits). In support of
13 this finding, the ALJ cites Dr. Gwinn's treating provider notes from 2013 to 2016
14 that include reports that Plaintiff "was doing well, her mood was good, and she
15 appeared relaxed and not anxious on examination." Tr. 567-68; Tr. 347-48, 354,
16 390, 415-16, 1053-55, 1058, 1061. In addition, the ALJ cited Plaintiff's 2017
17 report that she was "doing fine, mood good" on Sertraline; February 2018 report
18 that she "feels this is getting better with proper medication"; May 2018 reports that
19 her anxiety was controlled and she was "stable on current treatment"; and provider
20 reports in July 2018 that Plaintiff's anxiety and depression were improving with
21 medication. Tr. 568 (citing Tr. 390, 1029, 1032, 1049, 1084, 1121). Finally, as to

1 her ADHD, records from across the relevant adjudicatory period indicate that
2 Plaintiff was doing well on her medication, her focus and concentration were
3 improved with medication, and by 2018 records documented Plaintiff's ADHD as
4 "stable and controlled." Tr. 568 (citing Tr. 354 (noting she has been on the same
5 dose for 5-7 years), 394 ("doing well" on a low dose of ADHD medication), 1033,
6 1049-51, 1055, 1061).

7 Plaintiff argues, without specific citation to the medical evidence, that it was
8 "error for an ALJ to pick out a few isolated instances of improvement or a period
9 of months or years and then to treat them as a basis for concluding [Plaintiff] is
10 capable of working." ECF No. 13 at 16 (citing *Garrison v. Colvin*, 759 F.3d 995,
11 1017-18 (9th Cir. 2014) (noting that treatment notes "must also be interpreted with
12 an awareness that improved functioning while being treated and while limiting
13 environmental stressors does not always mean that a claimant can function
14 effectively in a workplace.")). However, as noted elsewhere in the ALJ's decision,
15 objective testing is "largely inconsistent" with Plaintiff's allegations of total
16 disability, including ongoing normal mental status examinations. *See* Tr. 568
17 (citing Tr. Tr. 330, 340, 390, 399, 421, 448, 489, 994, 1006, 1067, 1072, 1077-78,
18 1082, 1086, 1095, 1107, 1114-15, 1132). Plaintiff fails to offer specific evidence
19 from the record to support the argument that the effectiveness of Plaintiff's
20 medication was "isolated" or "sporadic"; nor did the ALJ make any specific
21 findings that the effectiveness of treatment showed that Plaintiff could work full-

1 time. Rather, the ALJ reasonably concluded that, despite evidence that could be
2 considered favorable to Plaintiff, longitudinal evidence of effective treatment of
3 Plaintiff's claimed mental impairments was inconsistent with her allegations of
4 incapacitating limitations. *See Burch*, 400 F.3d at 679 (where evidence is
5 susceptible to more than one interpretation, the ALJ's conclusion must be upheld).
6 This was a clear and convincing reason to discredit Plaintiff's symptom claims.

7 *3. Additional Reasons*

8 As noted by Defendant, Plaintiff failed to challenge all of the ALJ's reasons
9 for rejecting Plaintiff's symptom claims in her opening brief, and has therefore
10 waived her opportunity to challenge those reasons. ECF No. 14 at 4. The Court
11 may decline to address issues not raised with specificity in Plaintiff's opening
12 brief. *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir.
13 2008); *see also Kim v. Kang*, 154 F.3d 996, 1000 (9th Cir. 1998) (the Court may
14 not consider on appeal issues not "specifically and distinctly argued" in the party's
15 opening brief). Despite Plaintiff's waiver, the Court will briefly review the
16 additional reasons arguably given by the ALJ to discount Plaintiff's symptom
17 claims.

18 First, the ALJ found that the objective medical evidence does not fully
19 support the level of limitation claimed by Plaintiff. Tr. 567-69. An ALJ may not
20 discredit a claimant's pain testimony and deny benefits solely because the degree
21 of pain alleged is not supported by objective medical evidence. *Rollins v.*

1 *Massanari*, 261 F.3d 853, 857 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341,
2 346-47 (9th Cir. 1991); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989).

3 However, the medical evidence is a relevant factor in determining the severity of a
4 claimant's pain and its disabling effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. §
5 404.1529(c)(2). Here, the ALJ acknowledged that Plaintiff has "demonstrated
6 significant cognitive deficits on mental status examination"; however, the ALJ also
7 set out the medical evidence contradicting Plaintiff's claims of disabling
8 limitations. Tr. 568. For example, the ALJ noted a "significant variability in test
9 scores, which is largely inconsistent with [Plaintiff's] allegations of total
10 disability." Tr. 568 (citing Tr. 318-19, 330, 340, 463, 466-67 (noting "significant
11 discrepancy" in scores), 985-86, 1006, 1015-16, 1024). In addition, the ALJ found
12 Plaintiff has "consistently scored within the normal range on the Mini Mental
13 Status Examination," demonstrating good registration, attention and calculation,
14 recall, language, orientation, ability to follow simple commands, attention span,
15 concentration, recent and remote memory, orientation, and fund of knowledge. Tr.
16 568-69 (citing Tr. 330, 340, 390, 399, 421, 448, 489, 994, 1006 (scoring 28 out of
17 30 possible points), 1067, 1072, 1077-78, 1082, 1086, 1095, 1107, 1114-15, 1132).
18 Finally, the ALJ acknowledged that examinations have shown mild to moderate
19 cognitive deficits, but noted these impairments were accommodated in the assessed
20 RFC. Tr. 569.

1 In her reply brief, Plaintiff cites several treatment notes observing abnormal
2 speech, constricted affect, depressed and anxious mood, “retarded psychomotor
3 activity,” and fair judgment. ECF No. 15 at 6-7, 12 (citing Tr. 984, 1082, 1086,
4 1090). Plaintiff also notes that her treating provider, Dr. Douglas R. Gwinn,
5 assessed marked limitations in multiple “work-related activities.” However, the
6 Court notes that Plaintiff does not challenge the ALJ’s rejection of Dr. Gwinn’s
7 opinion in her opening brief. Moreover, regardless of evidence that could be
8 considered favorable to Plaintiff, it was reasonable for the ALJ to find the severity
9 of Plaintiff’s symptom claims was inconsistent with objective findings from the
10 longitudinal record. Tr. 567-69. “[W]here evidence is susceptible to more than
11 one rational interpretation, it is the [Commissioner’s] conclusion that must be
12 upheld.” *Burch*, 400 F.3d at 679.

13 Second, the ALJ found that Plaintiff’s statements “were not entirely
14 consistent with the record as a whole”; and specifically, Plaintiff “has made
15 inconsistent statements regarding her history, symptoms and limitations.” Tr. 569.
16 These inconsistencies, unchallenged by Plaintiff in her briefing, include: a report of
17 past trauma followed by subsequent ongoing denials of past trauma; reported
18 history of suicide attempts on some occasions, but specifically denying suicide
19 attempts on “many” other occasions and a denial of suicide attempts by Plaintiff’s
20 mother; a report of severe panic attacks three times a week in 2018, followed by a
21 report two weeks later that her anxiety was well-controlled on medication; reports

1 of difficulty sleeping “not fully supported by the record” showing consistent
2 reports that she generally slept well and denied sleep disturbance; and Plaintiff’s
3 allegations at the hearing that IBS caused her to be “unable to function half the day
4 is inconsistent with the objective medical record and her reports to providers” that
5 her IBS was well-controlled. Tr. 569 (citing Tr. 328, 367, 389, 414, 441, 448, 450,
6 487, 491, 494, 520, 529, 983, 994, 1004, 1011, 1029-32, 1049, 1053, 1058, 1061,
7 1066, 1069, 1073, 1076, 1095, 1107, 1125, 1128, 1132). In addition, the ALJ
8 noted that Plaintiff’s “ability to speak her mind clearly, advocate for certain
9 conditions and request very specific medications is not fully consistent with an
10 individual truly suffering from the severe degree of cognitive limitations alleged by
11 [Plaintiff].” Tr. 569, 1124, 1096. Based on the foregoing, in evaluating the
12 severity of Plaintiff’s symptoms, the ALJ properly considered inconsistencies in
13 Plaintiff’s statements, and between her testimony and her conduct. *See Thomas*,
14 278 F.3d at 958-59; *Tommasetti*, 533 F.3d at 1039 (prior inconsistent statements
15 may be considered). This was a clear, convincing, and unchallenged reason for the
16 ALJ to discount Plaintiff’s symptom claims.

17 Finally, the ALJ found that Plaintiff was “only seeking treatment for
18 secondary gain purposes and not because she actually needed help with her mental
19 health issues, which is inconsistent with her underlying claims of disability.” Tr.
20 570. In support of this finding, the ALJ cited continuing evidence that Plaintiff’s
21 stated treatment goal was to obtain benefits, and on at least one occasion she was

1 unable to identify an overarching treatment goal aside from “to get financially
2 stable.” Tr. 569-70 (citing Tr. 1076 (Plaintiff and her mother explained they were
3 “here for disability purposes”), 1080 (Plaintiff had “difficulty identifying an
4 overarching [treatment] goal other than to get financially stable”), 1093 (noting
5 that Plaintiff sought treatment “because she got a letter from DSHS that she needed
6 to have mental health assessment in order to continue to receive benefits”)). It was
7 proper for the ALJ to consider evidence that Plaintiff was motivated by secondary
8 gain in evaluating her symptom claims. *See Matney on Behalf of Matney v.*
9 *Sullivan*, 981 F.2d 1016, 1020 (9th Cir. 1992).

10 The Court concludes that the ALJ provided clear and convincing reasons,
11 supported by substantial evidence, for rejecting Plaintiff’s symptom claims.

12 **B. Medical Opinions**

13 There are three types of physicians: “(1) those who treat the claimant
14 (treating physicians); (2) those who examine but do not treat the claimant
15 (examining physicians); and (3) those who neither examine nor treat the claimant
16 [but who review the claimant's file] (nonexamining [or reviewing] physicians).”
17 *Holohan v. Massanari*, 246 F.3d 1195, 1201–02 (9th Cir. 2001) (citations omitted).
18 Generally, a treating physician's opinion carries more weight than an examining
19 physician's, and an examining physician's opinion carries more weight than a
20 reviewing physician's. *Id.* If a treating or examining physician's opinion is
21 uncontradicted, the ALJ may reject it only by offering “clear and convincing

1 reasons that are supported by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d
2 1211, 1216 (9th Cir. 2005). Conversely, “[i]f a treating or examining doctor's
3 opinion is contradicted by another doctor's opinion, an ALJ may only reject it by
4 providing specific and legitimate reasons that are supported by substantial
5 evidence.” *Id.* (citing *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995)).
6 “However, the ALJ need not accept the opinion of any physician, including a
7 treating physician, if that opinion is brief, conclusory and inadequately supported
8 by clinical findings.” *Bray*, 554 F.3d at 1228 (quotation and citation omitted).

9 The entirety of Plaintiff’s argument regarding the medical opinion evidence
10 in her opening brief, consisting of less than one page, is that the ALJ improperly
11 relied on the opinion of non-examining, non-treating doctors, as opposed to
12 Plaintiff’s examining and treating providers. ECF No. 13 at 16-17. Plaintiff is
13 correct that the opinion of a non-examining medical advisor cannot, by itself,
14 constitute substantial evidence that justifies the rejection of an examining or
15 treating physician. ECF No. 13 at 16 (citing *Morgan v. Comm’r of Soc. Sec.*
16 *Admin.*, 169 F.3d 595, 600 (9th Cir. 1999)). However, where, as here, the treating
17 or examining physician's opinion is contradicted by medical evidence, the opinion
18 may still be rejected if the ALJ provides specific and legitimate reasons supported
19 by substantial evidence in the record. *See Andrews v. Shalala*, 53 F.3d 1035, 1041
20 (9th Cir.1995). As noted by Defendant, the ALJ offered several additional reasons
21 for rejecting the opinions of the treating and examining providers listed by Plaintiff

1 in her brief. Moreover, Plaintiff entirely failed to challenge any of the ALJ's
2 reasons for rejecting the opinions of Douglas R. Gwinn, M.D., W. Scott Mabee,
3 Ph.D., Brian R. Campbell, Ph.D., Debra D. Brown, Ph.D., Kayleen Islam-Zwart,
4 Ph.D.,³ and has therefore waived her opportunity to challenge those reasons. *See*
5 *also Kim v. Kang*, 154 F.3d 996, 1000 (9th Cir. 1998) (the Court may not consider
6 on appeal issues not "specifically and distinctly argued" in the party's opening
7 brief). As noted by Defendant, Plaintiff also failed to raise any challenge to the
8 ALJ's re-consideration of the testimony of Nancy Winfrey, Ph.D., the medical
9 expert in the previous hearing, pursuant to the remand order of the District Court.

10
11 _____
12 ³ In her opening brief, Plaintiff listed "examining providers," without any further
13 argument, which included Jennifer Van Wey, Psy.D., John F. McRae, Ph.D., and
14 Robby C. Riddle, Lt Col, USAF, MC, FS, ECF No. 13 at 17. However, as noted
15 by the ALJ, these opinions were 6-7 years before the alleged onset date of
16 disability and "therefore not pertinent." Tr. 572. In addition, Plaintiff lists treating
17 providers Betty L. Vicena, LISCW and Ronald L. Eastman, MED LMHC; but the
18 record only includes treatment notes from these providers, as opposed to medical
19 opinions that assessed specific functional limitations. Regardless, as noted *supra*,
20 the Court declines to address the ALJ's consideration of these medical opinions
21 and records, as they are not challenged with specificity by Plaintiff. *See*
Carmickle, 533 F.3d at 1161 n.2.

1 Based on the foregoing, the Court declines to address the ALJ's consideration of
2 the medical opinion evidence because it was not raised with specificity in
3 Plaintiff's opening brief. *See Carmickle*, 533 F.3d at 1161 n.2.

4 **CONCLUSION**

5 A reviewing court should not substitute its assessment of the evidence for
6 the ALJ's. *Tackett*, 180 F.3d at 1098. To the contrary, a reviewing court must
7 defer to an ALJ's assessment as long as it is supported by substantial evidence. 42
8 U.S.C. § 405(g). As discussed in detail above, the ALJ provided clear and
9 convincing reasons to discount Plaintiff's symptom claims, and Plaintiff waived
10 her opportunity to challenge the medical opinion evidence. After review, the Court
11 finds the ALJ's decision is supported by substantial evidence and free of harmful
12 legal error.

13 **ACCORDINGLY, IT IS HEREBY ORDERED:**

14 1. Plaintiff's Motion for Summary Judgment, ECF No. 13, is **DENIED**.

15 2. Defendant's Motion for Summary Judgment, ECF No. 14, is

16 **GRANTED.**

17 The District Court Executive is hereby directed to enter this Order and
18 provide copies to counsel, enter judgment in favor of the Defendant, and **CLOSE**
19 the file.

20 **DATED** August 20, 2021.

21 

Stanley A. Bastian
Chief United States District Judge